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IN THE

Supreme Court of the United States

No. 318,

SAMPSON TULEE, *Appellant*,

v.

STATE OF WASHINGTON, *Appellee*.

Appeal from the Supreme Court of the State of Washington.

APPELLEE'S REPLY BRIEF.

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CLARIFICATION OF QUESTION INVOLVED.

Because of the conflict between State and Federal jurisdiction, this case is of transcendant importance to both the United States Government and the State of Washington for the purpose of settling the question as to whether or not Indians of various tribes have the right to fish at usual and accustomed places off their reservations, at points otherwise wholly within the State of Washington, without being subject in any manner whatsoever to the state's fish and game laws. This question arises under a treaty provision common to some nine treaties negotiated by Isaac I. Stevens, Governor and Superintendent of Indian Affairs of Washington

Territory in 1855[1] with the several tribes and bands of Indians found in that section of the Northwest now constituting the State of Washington, which provision reads as follows:

> "The exclusive right of taking in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, *as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory*, and of erecting temporary buildings for curing them * * * (Par. II of Article III, Yakima Treaty—12 Stat. 951.) (The words italicized appear in all of the Stevens treaties.)

While appellant's brief repeatedly refers to the regulation involved as a "state licensing statute,"[2] and seems to infer throughout argument that the particular fishing statute is violative of the treaty provision because of its particular requirements, and emphasizes that the character of its regulatory features in effect imposes a further monetary consideration for rights secured by the treaty, we assume that the broad issue herein presented is still the applicability of any valid state fishing regulation to Indians who claim immunity therefrom by reason of the Stevens treaties in their "off the reservation" fishing activities. We do not understand that appellant now seeks to narrow the issue to whether or not the particular fishing statute is a valid exercise of the state's police powers. That the former was considered to be the primary issue and was

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[1] Article 3, Treaty of Dec. 26, 1854, with Nisqualli, Puyallup, etc., 10 Stat. 1132; Article 5, Treaty of Jan. 22, 1855, with Dwamish, Suquamish, etc., 12 Stat. 927; Article 4, Treaty of Jan. 26, 1855, with S'Klallam, 12 Stat. 933; Article 4, Treaty of Jan. 31, 1855, with Makah, 12 Stat. 939; Article I, Treaty of June 9, 1855, with Walla Walla, Cayuse, etc., 12 Stat. 945; Article 3, Treaty of June 11, 1855, with Nez Perces, 12 Stat. 157; Article 1, Treaty of June 25, 1855, with Tribes of Middle Oregon, 12 Stat. 963; Article 3, Treaty of July 1, 1855-Jan. 25, 1856, with Quinaielt, etc., 12 Stat. 971; Article 3, Treaty of July 16, 1855, with Flatheads, etc., 12 Stat. 975.

[2] Sec. 5703, Remington's Revised Statutes of Washington.

urged by both the United States Government and the State of Washington in the court below, and was ultimately decided by that court, is made plain by the following excerpt from the opinion (Transcript of Record, P. 17):

> "The only question raised upon this appeal is whether appellant, as a member of the Yakima tribe of Indians, was, under the treaty between the United States and the Yakima tribe, entitled to catch fish in the Columbia River, without the territorial limits of the Yakima Indian reservation, without regard to the statutes of the state of Washington covering the taking of food fish from the lakes and rivers within this State."

Therefore, we do not now regard appellant's frequent reference to the "state licensing statute" as an attempt to side-step the fundamental issue raised in this case, the final determination of which will be controlling of the similar issues obtaining in the several injunction suits now pending.[3]

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[3] In both Northern and Southern Divisions of the Western District of Washington, actions have been brought by Indians individually and on behalf of their respective tribes, through private counsel, presenting precisely the same issue as presented in this case. In 1937, members of the Nisqually Tribe of Indians brought an injunction suit entitled "*Chief Peter Kalama, et al.* v. *Brennan, et al.*, (Cause No. 598) in the Western District of Washington, Southern Division, and District Judge Cushman issued a preliminary injunction, restraining the state law-enforcement officers from interfering with Indian fishing operations in the Nisqually River from the northern border of the Nisqually Indian Reservation to its mouth on Puget Sound. Judge Cushman retired from the bench before the petition for permanent injunction could be heard. Meanwhile, the United States Attorney for the Eastern District of Washington and the Attorney General of the State of Washington commenced the present suit in the State Superior Court. The government petitioned for a writ of habeas corpus in the Federal Court for the Eastern District of Washington (*United States of America in behalf of its Ward, Sampson Tulee*, v. *C. R. House, Sheriff of Klickitat County, Washington*). On June 22, 1939, Federal District Judge J. Stanley Webster, denied the petition and handed down an oral opinion, which was not officially reported, holding that the right secured to the Yakima Tribe of Indians by the Stevens Treaty referred to was subject to the paramount and superior

ARGUMENT IN REPLY.

The principal arguments advanced by appellant in this case, in the court below and on this appeal, have been vigorously urged upon this court and rejected by it in the leading cases upon which the appellee State of Washington relies, namely, *Ward* v. *Race House*, 163 U. S. 504, *Coyle* v. *Smith*, 221 U. S. 559, *U. S.* v. *Winans*, 198 U. S. 371, and *State ex rel. Kennedy* v. *Becker*, 241 U. S. 566.

That the holdings in these landmark cases have been recognized and accepted by the appellant government up until the time of this appeal is evidenced by the opinion of the Solicitor for the Department of Interior, dated April 5, 1934, (Vol. 54, Decisions of the Department of Interior, p. 418) whose conclusions at that time were identical with the position of the appellee State of Washington in this case, and in full consonance with the effect given these cases by

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right of the state, in the exercise of its sovereign police powers, to reasonably regulate the taking of salmon from the waters within its jurisdiction. On appeal, the United States Circuit Court of Appeals for the Ninth Circuit (110 Fed. 2nd 897-801) held that insofar as the question raised "involved treaty or constitutional rights", the state courts "are as competent as the federal courts to decide them" and in pursuance thereto, the case at bar was commenced anew in the state courts. While the Tulee case was proceeding through Federal courts, District Judge Bowen in the Northern Division of the Western District of Washington, in *Sampson* v. *Brennan*, 39 Fed. Supp. 74, granted a preliminary injunction, holding in the following written opinion: "In view of the rulings by Judge Cushman of this court in *Mason* v. *Sams*, 5 Fed. 2nd 255, and in *Chief Peter Kalama, et al.* v. *Brennan, et al.*, Cause No. 598, Western District of Washington, Southern Division, order of Nov. 3, 1937, plaintiff's motion for temporary injunction herein will be granted.". In June, 1941, District Judge Bowen granted a permanent injunction in the case of *Makah Indian Tribe, et al.* v. *B. T. McCauley, et al.*, No. 218 (39 Fed. Supp. 75) which case is now on appeal to the Circuit Court of Appeals for the Ninth Circuit. In 1941, District Judge Black in the Southern Division, Western District of Washington, granted a preliminary injunction in the *Quileute Indian Tribe* v. *B. T. McCauley*, but deferred consideration of the case on its merits pending the outcome of the appeal herein.

the highest courts of Washington,[4] Michigan,[5] Wisconsin,[6] New York.[7] In fact, appellee's position could not be more succinctly stated than by employing the language of the Solicitor's opinion, which we herewith set forth:

"MARGOLD, Solicitor:

Near Celilo Falls, on the Oregon shore of the Columbia River, is a small Yakima village called Celilo. For many generations the Columbia River at this point has been a usual and accustomed fishing place of the few Indians who have made their homes at Celilo and of other members of the tribe. Celilo is not within the Yakima Reservation but is upon a seven-acre tract owned by the United States. In 1929, Congress placed this tract under the control of the Secretary of Interior "for the use and benefit of certain Indians now using and occupying the land as a fishing camp site." (45 Stat. 1158)

The Treaty between the United States and the Yakama (usually designated Yakima) Nation of Indians was concluded June 9, 1855. (12 Stat. 951) . Article 3 of that treaty provides that "the exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." The nature of the fishing privilege thus reserved at usual and accustomed places outside the Yakima Reservation has been adjudicated by the Supreme Court of the United States.

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[4] *U. S.* v. *Taylor*, 3 Wash. Terr. 88; *State of Washington* v. *Towessnute*, 89 Wash. 478; *State of Washington* v. *Alexas*, 89 Wash. 492; *State of Washington* v. *George Meninock*, 115 Wash. 528; *State of Washington* v. *Jim Wallahee*, 143 Wash. 117; *State of Washington* v. *Tulee*, 107 Wash. 2nd 16.

[5] *People* v. *Chosa*, 252 Mich. 154.

[6] *State* v. *Morrin*, 136 Wis. 552, (1908); *State* v. *La Barge*, 234 Wis. 449 (1940).

[7] *State ex rel. Kennedy* v. *Becker*, 215 N. Y. 42.

"It is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the State (Greer v. Connecticut, 161 U. S. 519; Ward v. Racehorse, 163 U. S. 504, 507), subject of course to any valid exercise of authority under the provisions of the Federal Constitution. It is not denied—save as to the members of this tribe—that this inherent power extended over the *locus in quo* and to all persons attempting there to hunt or fish, whether they are owners of the lands or others. The contention for the plaintiffs in error must, and does, go to the extent of insisting that the effect of the reservation was to maintain in the tribe sovereignty *quoad hoc*. As the plaintiffs in error put it: 'The land itself became thereby subject to a joint property ownership and the dual sovereignty of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be.' We are unable to take this view. It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the locus in quo, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.

* * * We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather we are of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. This was clearly recognized in United States v. Winans, 198 U. S. 371, 384, where the court in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859, said (referring to the authority of the State of Washington): "Nor does

it'' (that is, the right of 'taking fish at all usual and accustomed places') "restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.'' Kennedy v. Becker, 241 U. S. 556, 562, 562-564 (1916).

In accord are the cases of *United States* v. *Winans,* 198 U. S. 317 (1905); *People* v. *Chosa,* 252 Mich. 154, 233 N. W. 205 (1931). It follows that a regulation of fishing imposed by a State, operative on all persons alike, reasonably adapted to the preservation of wild life in the waters of the State for the common benefit, and not in its intendment or operation a denial to the privileged Indian community of its right to fish, is lawful, and not a treaty violation. This principle permits a State to restrict the devices and types of tackle which fishermen generally, including the privileged Indian community, may employ in the waters within its jurisdiction. *Kennedy* v. *Becker, supra; State* v. *Towessnute,* 89 Wash. 478, 154 Pac. 805 (1916); *State* v. *Morrin,* 136 Wis. 552, 117 N. W. 1006 (1908).

The Columbia River is under the concurrent jurisdiction of the States of Oregon and Washington (10 Stat. 90; 11 Stat. 383) and the power of each State to regulate fishing in the river is established. *McGowan* v. *Columbia Packers' Association,* 245 U. S. 352 (1917); *Nielson* v. *Oregon,* 212 U. S. 315 (1908).

The first question propounded by the Commissioner of Indian Affairs concerns the use of a "willow weir,'' a device long employed by the Indians to obstruct a stream in such wise that the salmon run is directed through a particular channel. The Commercial Fisheries Code of Oregon makes it "unlawful for any person or persons to operate or maintain * * * any fish traps, weir * * * or any device * * * used in catching salmon * * * without first having obtained * * * a license therefor.'' Oregon Code Ann. (1930) Sec. 40-503. See also Secs. 40-309 ff. All funds derived from license fees are employed under the direction of the State Fish Commission in the preservation, propaga-

tion and protection of fish, the maintenance of hatcheries and related enterprises. Sec. 40-105. The classification of fishing devices is entrusted to the State Fish Commission Sec. 40-115. It does not appear that any regulation promulgated by the State Fish Commission discriminates against Indian fishermen. Nor it is claimed that license to employ any device has been refused to Indian fishermen arbitrarily.

Therefore, answering question 1, it is my opinion that the Treaty of 1855 does not reserve to the Yakima Indians the privilege of constructing a "willow weir" in the channel of the Columbia River at Celilo Falls in disregard of the State laws and regulations above mentioned.

The second question concerns the right of the State to require the Indians to secure a license for the selling of fish and to require that they pay poundage tax upon such sales. Such requirements are imposed by the Commercial Fisheries Code and operate equally upon all persons. Secs. 40-501, 40-515. The privilege reserved in the Treaty of 1855 is expressly defined as a "right of taking fish." It cannot be construed as an exemption from the general laws of the State taxing and regulating the sale of fish. It does not appear that a license has been required for or a tax imposed upon the sale of fish by the Indians upon their reservation or at any other place under the jurisdiction of the United States. Answering question 2, it is my opinion that no Indian may lawfully sell fish at any place within the jurisdiction of the State of Oregon unless he shall have obtained a license for that purpose and shall pay such tax as the State may impose upon vendors. Of course, any discriminatory treatment Indians vendors in the administration of these regulations would be unlawful."

Furthermore, the unreported opinion of Acting Solicitor Kirgis of the Department of the Interior, dated June 15, 1937 (referred to on Page 40, Appellant's Brief) does not overrule the previous opinion of April 5, 1934, cited above. In the latter opinion, the Acting Solicitor concludes that

the Indians may have a possible claim against the government for the destruction of their fishing places on the Columbia River occasioned by construction of the Bonneville Dam by the United States.

The policy which the government may adopt towards its Indian wards has nothing whatsoever to do with the issue involved herein. The fact that the government, as stated in the opinion, may feel morally or legally obligated to provide monetary reimbursement to the Indians for the extinguishment of fishing sites through its hydroelectric developments does not alter the effect of the decisions of this court on the question of the state's power to reasonably regulate the fishing operations of all those entitled to enjoy the privilege in waters within its jurisdiction. Indeed, appellant has nowhere asserted that the United States has any authority whatsoever to make provision for the protection of fish in the waters of the State of Washington. No such authority has been ceded to the Federal Government. The state's fisheries are local in nature, and particularly the salmon fisheries in the Columbia River, since the salmon themselves spawn in the tributaries and headwaters found within the state. A conservation law, operative upon the people of the state, but not operative upon the Indians when within the state but off their reservations who are privileged to enjoy fishing in common with all citizens, would not subserve the interests of either the Indian citizen or the white citizen. The state, through its fish and game laws, is exercising an inherent obligation of sovereignty when it conserves and perpetuates a valuable food supply in which all the people of the state have a common concern.

The ever growing magnitude of the state's conservation problems on the Columbia River alone is recognized in the opinion *sub silentia* in the admitted destruction of fishing sites by the United States government and the concomitant diminution of the supply in accommodating the fish runs to new and unnatural conditions.

Appellee does not differ, but on the other hand, agrees with the Acting Solicitor in his opinion cited above that the

cases of *United States* v. *Winans* and *Kennedy* v. *Becker* stand for the proposition that the treaties perpetually guaranteed the Indians against any discrimination toward them in their fishing activities "at usual and accustomed places in common with the citizens of the Territory." THE CASES, HOWEVER, HOLD THAT THE INDIANS AND ALL OTHERS WHO PARTICIPATE IN THE TAKING OF FISH FROM THE WATERS WITHIN THE JURISDICTION OF THE STATE ARE SUBJECT TO ANY REASONABLE AND APPROPRIATE REGULATION INHERENT IN THE SOVEREIGNTY OF THE STATE WHICH MAY BE NECESSARY FOR THE PRESERVATION OF WILD LIFE.

TREATY WAS NOT AN ATTEMPT BY THE UNITED STATES TO ABRIDGE THE STATE'S POLICE POWERS. IT WAS INTENDED TO SECURE THE TRIBE FROM ANY DISCRIMINATION AS TO FISHING PRIVILEGES "AT THEIR USUAL AND ACCUSTOMED FISHING PLACES" OFF THE RESERVATION AGAINST THE TRIBAL MEMBERS IN FAVOR OF THE CITIZENS OF THE UNITED STATES.

Appellant in this court, and in the court below, relies principally on the case of *United States* v. *Winans, supra,* and attempts to distinguish *Ward* v. *Race Horse, supra, Coyle* v. *Smith, supra,* and *Kennedy* v. *Becker, supra,* which cases appellee submits are controlling. We shall, therefore, discuss each case in its chronological order:

(1) *Ward* v. *Race Horse* was decided by this court in 1896. Race Horse, a Bannock Indian who retained his tribal relation and resided on a reservation, was convicted of violation of game laws of Wyoming on unoccupied public lands of the United States not within a reservation. The Treaty (15 Stat. 673) made when Wyoming was a territory, provided that the Indians

> "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found

thereon, and so long as peace subsists among the whites and Indians on the border of the hunting districts."

The Circuit Court held that the Act of Congress admitting Wyoming into the Union did not by necessary implication repeal or abrogate the treaty, and that the treaty provision remained in force. The decree was reversed on appeal to this court.

Appellant herein attempts to distinguish the case at bar on the ground that the hunting rights reserved in the *Race Horse* case were of an ephemoral nature, as distinguished from a continuous or perpetual right. This was the exact view entertained by the Circuit Court, which had held the right was a continuing one and survived Wyoming's full fruition of statehood.

The *Race Horse* decision, in substance, holds that Congress has the power by subsequent statute to abrogate the provisions of an Indian Treaty and that when an act of Congress admits a state into the Union, and declares without reservation that such state shall have all the powers of the other states of the Union, this constitutes an abrogation of any previous treaty stipulation with the Indians within the territory of such state respecting their right to take fish and game; that to exempt Indians from state laws regulating fishing and hunting within the border of a state after its admission into the Union would deprive the state of its sovereign power to regulate the rights of hunting and fishing, and would deny to such state admission into the Union on an equal footing with the original states, on the ground that a treaty with the national government giving the right to hunt and fish within a territory which subsequently is embraced within the limits of a state is a privilege in conflict with the act of admitting the state into the Union on an equality with the other states and is repealed thereby. We quote from page 514 of the opinion:

"Determining, by the light of these principles, the question whether the provision of the treaty giving the right to hunt on unoccupied lands of the United States

in the hunting districts is repealed, in so far as the lands in such districts are now embraced within the limits of the state of Wyoming, it becomes plain that the repeal results from the conflict between the treaty and the act admitting the state into the Union. The two facts, the privilege conferred and the act of admission, are irreconcilable in the sense that the two under no reasonable hypothesis can be construed as coexisting."

This court has never repudiated the principles announced in the *Race Horse* case. To the contrary, it has cited the *Rase Horse* ruling with approval on the proposition of the equality of states to govern their internal affairs,[8] and has specifically reaffirmed the pronouncements therein on the question of a state's absolute power to regulate the taking of wild life within its border. We refer to *Kennedy* v. *Becker*, 241 U. S. 556, 562 (which case will be discussed later in this brief) and *Lacoste* v. *Dept. of Conservation*, 263 U. S. 545, 549.

In the *Lacoste* case, the state of Louisiana was upheld in the exertion of its police power to protect wild animals for the common benefit to the extent of requiring the payment of a tax upon their skins or hides as a condition precedent to transfer of its title to the dealer paying the tax. This court said, at pages 549 and 552:

"The wild animals within its borders are, so far as capable of ownership, owned by the State in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power the State may regulate and control the taking, subsequent use and property rights that may be acquired therein. Geer v. Connecticut, 161 U. S. 519, 528; *Ward* v. *Race Horse*, 163 U. S. 504, 507; Silz v. Hesterberg, 211 U. S. 31, 39; Patsone v. Pennsylvania, 232 U. S. 138, 143; *Kennedy* v. *Becker*, 241 U. S. 556, 568; Carey v. South Dakota, 250 U. S. 118; State v. Rodman, 58 Minn. 393, 400. * * * Protection of the wild

[8] *Bollin* v. *Nebraska*, 176 U. S. 83, 88; *Coyle* v. *Oklahoma*, 221 U. S. 559, 573.

life of the State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection."

To the same effect is the case of *Van Camp Sea Food Co.* v. *Department of Natural Resources of State of California*, 30 F. (2nd) 111, decided by Circuit Judge Rudkin of the Ninth Circuit, on Jan. 18, 1929, which was cited with approval by this court in *Bayside Fish Co.* v. *Gentry*, 297 U. S. 422, 426 (1936). This court upheld the jurisdiction of the state fish and game commission to regulate and control the fish industry of the state, including fish canneries and fish reduction plants, or at any plant where fishery products are manufactured.

State courts, in passing upon the question of the applicability of fish and game laws to Indians while fishing off their reservations have recognized the authority of *Ward* v. *Race Horse*. See:

State v. *Morrin*, 136 Wis. 562 (1906);
State v. *LaBarge*, 234 Wis. 55[illegible] (1940);
People v. *Chosa*, 252 Mich. 154 (19[illegible]
Kennedy v. *Becker*, 215 N. Y. 42 (1915);
State v. *Tulee*, 107 Wash. 2nd 16 (1941); (citing prior decisions relying upon *Ward* v. *Race Horse*).

That the appellant government has heretofore accepted the recognized force and effect of *Ward* v. *Race Horse* and other land mark cases which have formulated the guiding principles of law relating to a state's police power over wild life found within its borders is further evidenced in a well-reasoned opinion by Acting Solicitor Fahy, rendered June 15, 1934 (54 Decisions of the Department of Interior, p. 517) in which it was held that the Migratory Bird Treaty Act of July 8, 19[illegible] (40 Stat. 755) is applicable to the Indians of the Swinomish Indian Reservation in the State of Washington, notwithstanding Article V of the Stevens Treaty of Jan. 22, 1855, reserving "the right of taking fish at usual and accustomed grounds and stations * * * in common with

all citizens of the Territory * * * together with the privilege of hunting * * * on open and unclaimed lands." We quote from page 520 of the opinion:

> "* * * And even though such laws (referring to acts of Congress) should conflict with the provisions of prior treaties with the Indians, there is respectable authority for upholding their validity. Thus in The Cherokee Tobacco Case (11 Wall. 616) it was held that a law of Congress imposing a tax on tobacco, if in conflict with a prior treaty with the Cherokees, was paramount to the treaty. And in *Ward* v. *Race Horse* (163 U. S. 504), the court ruled that the provision in the treaty of Feb. 24, 1869, with the Bannock Indians, whose reservation was within the limits of what is now the State of Wyoming, that 'They shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon', was superseded by the provisions of the Enabling Act admitting Wyoming into the Union, and that the treaty provision did not give the Indians the right to exercise the hunting privilege within the limits of the State in violation of its laws."

* * * * * * * * *

(2) *United States* v. *Winans*, 198 U. S. 371 (1905) is contended by appellant to be decisive in its favor for the proposition that Indians fishing at accustomed fishing sites off the reservation is beyond the pale of state regulation.

This was an action brought by the United States to enjoin Winans Bros., who were engaged in large commercial fishing enterprise, from refusing the Indians access to their ancient fishing places and depriving them of equal fishing rights by the actual monopoly of fishing privileges by maintenance of fishing wheels. This court very properly sustained the Indians in their treaty guarantees against discrimination. The only issue involved was a land owner's attempt to ignore the Indian's easement. The land in question had passed from the federal government by patent title to a white owner, who in addition, had secured from the State of Washington a license to erect and operate a fish-

ing wheel. The court held that the white owner had made it impossible for the Indian to enjoy fishing privileges on a parity with "citizens of the Territory". The case decided that the government grantee came into possession of land which was impressed with a perpetual servitude, or easement, and even the state could not grant something additional which would impair that easement. This was not a case brought against the state to restrain the exercise of its inherent police power, but involves an invasion by private individuals of the rights of the Indians thereby discriminated against as a class and so in this essential aspect the facts of the *Winans* case differ from the facts of the case at bar. The court was careful to point out that it was sustaining an easement as against private owners. After making clear that the provision in the treaty imposed a servitude on the land which could not be extinguished, the court said, at p. 384:

> "Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easement as enables the right to be exercised."

The Indians had been discriminated against, and deprived of equal fishing privileges with the whites. That the government did not seek to interfere with the state's regulation of fishing in the interest of all, is made very plain in the prayer of Solicitor-General Henry M. Hoyt, who represented the United States government. We quote from page 54 of Appellant's Brief, Vol. 34, Transcripts of Records and File Copies of Briefs (1904):

> "* * * It seems quite clear that the fish wheels are very destructive of fish, and therefore are improvident and unconscionable devices. It certainly seems that four wheels in the space of a mile and a half are inordinate. If they are to be maintained at all, there should be some restriction as to their number and method and daily hours of operation, in order to give the fish and the Indians a chance. Certainly the wheels should not be permitted to create and maintain a mo-

nopoly until all the fish and game are gone. * * * In any case, if it is true that they can fish to advantage elsewhere than at the particular points where the wheels are, they should be allowed to fish without undue restriction up and down the river and above and below the wheels throughout the entire water front. *On the other hand, they cannot claim to have an exclusive right, and enjoying their right in common with citizens and under the modified injunction in common with defendants, it may be just to restrict in reasonable ways their times and modes of access to the property and hours for fishing. If it is not fair under the present conditions that they should enjoy without restriction their ancient right of camping and curing fish in temporary houses on the defendants' property, a decree can indicate the proper limitation.* * *"

It is the appellee's contention that the *Winans* case stands for the proposition that the Stevens Treaty of 1855 vouchsafed to the confederated Yakima tribe perpetual easement rights of ingress to and egress from their usual and accustomed fishing grounds, there to *"fish in common with the citizens of the territory."*

This interpretation of the *Winans* case has been placed thereon by state courts who have considered the effect of the *Winans* decision[9], and is made cogently clear in the case of *Kennedy* v. *Becker, supra,* which we shall discuss next.

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[9] *State* v. *LaBarge*, 234 Wis. 552 (1940); *People* v. *Chosa*, 252 Mich. 154 (1930); *State* v. *Meninock*, 115 Wash. 528 (1921); *State* v. *Tulee*, 107 Wash. 2nd 16 (1941); *Kennedy* v. *Becker*, 215 N. Y. 42 (1915). The reasoning of the New York court in *Kennedy* v. *Becker*, and the interpretation of the *Winans* case is significant. In an unanimous opinion, participated in by Mr. Justice Cardozo, the court said. "* * * As has been said, this case does not deal with the rights of Indians on a reservation set apart for their use. It deals with the interpretation of a provision reserving to them the right in common with other people to take fish on territory which had been ceded away and which does not purport to secure to them an exclusive and special privilege, but simply one which might be enjoyed by them in common with other people. The right of the state to enact police legislation for the preservation of game and fish is so well recognnized and has been so widely exercised that

(3) *Kennedy* v. *Becker* was decided in 1916. The opinion was written by Mr. Justice Hughes before he resigned from the bench, and was adopted by the court and the opinion delivered by Mr. Chief Justice White.

We wish to point out that every major contention of the appellant in the case at bar was strenuously advanced therein by both the Plaintiff in Error and the United States government. In order to accede to appellant's position herein, it would be necessary for this court at this time to

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there is no need to spend any time in demonstrating or justifying its existence. Beyond any question it can exercise this power as against other people who enjoy in common with the Seneca Indians the right to fish in Eighteen Mile Creek. It seems to me that it would be an unusual and unreasonable interpretation of this reservation to hold that it relieved the Indians from all of these regulations which are applicable to such other members of the community. The interpretation that their rights are subject to the same regulation as would be applied to others seems much more reasonable and it does not by any means result in emasculating the reservation which was placed in their treaty. Except for such reservation they might be and very likely would be excluded from going upon the stream at all for fishing purposes. The reservation secures them against any such result as this and gives them a right or easement to go there as against their grantee and any other persons. This fundamental right will not be destroyed. It will simply be subjected to such regulation as the state deems to be necessary for the advantage of all of its inhabitants in preserving game and fish.

This construction is in accordance with what was said in *United States* v. *Winans* (198 U. S. 371, 384). There by treaty the right had been reserved to certain Indians of "taking fish at all usual and accustomed places in common with the citizens of the Territory of Washington." The state of Washington granted the right to use fishing wheels which practically excluded the Indians from fishing at all at certain point, and the question was whether the state might do this. It was held that it might not; that such a course would practically exclude the Indians from their right of taking fish. But it was said that the rights thus secured to the Indians of "taking fish at all usual and accustomed places" did not "restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised."

depart from the clear rule laid down by it in the *Kennedy* case.[10]

In the *Kennedy* case, three members of the Seneca tribe were arrested by law enforcement officials of the State of New York, and charged with violation of the state fish and game code. The defendants contended that as members of the Seneca Tribe they were entitled to fish without state restriction by virtue of the Treaty of Big Tree (1797) between the Seneca Nation and Robert Morris, which treaty had been made under the authority of the United States, and had been ratified by the senate and proclaimed by the president. A large tract of land had been ceded away by the treaty, which contained this reservation.

> "Also, excepting and reserving to them, the said parties of the first part and their heirs, the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed."

This court held that this was a guarantee of fishing privileges in common with the grantees and their heirs, that the lands were impressed with a servitude for the enjoyment thereof which could not be extinguished, but nevertheless, the Indians had no greater privileges than the grantees, and that the fishing privileges accorded to all were subject to the power of appropriate legislation inherent in the sovereignty of the state over the land where the privilege was exercised (quoting *U. S.* v. *Winans, supra*).

Appellant contends the language in the *Winans* case respecting the state's powers of appropriate regulation was *dictum*. If it be considered *dictum* in the *Winans* case in a strict technical sense, we submit that it was *judicial dictum*

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[10] The rule laid down by this court in *Kennedy* v. *Becker* has been adopted and followed in *State* v. *LaBarge*, 234 Wis. 552 (1940); *People* v. *Chosa*, 252 Mich. 154 (1930); *State* v. *Meninock*, 115 Wash. 528 (1921); *State* v. *Tulee*, 107 Wash. 2nd 16 (1941). Since 1916, the *Kennedy* case has been regarded as the settled law, and any departure at this time from the rule announced therein would have an important administrative effect in these several states and others which have followed this rule.

and not *obiter dictum*. It might be pointed out (1) that the language used by the court in the *Winans* case was part of the court's direct answer to the contention "• • • that the rights conferred upon the Indians are subordinate to the powers acquired by the state upon its admission into the Union" and (2) the court, in *Kennedy* v. *Becker*, expressly recognized the *Winans* case as authority for the proposition that the common fishing privileges secured on the ceded territory is subject to reasonable regulation by the state.

Appellant contends the case at bar can be distinguished in that (a) the existence of the sovereignty of New York was understood, (b) Seneca Treaty was not an engagement direct with the government, but was essentially like the function now performed by the Secretary of the Interior whose approval is required before certain types of contracts entered into by the Indians can become effective, and that once the approval is granted, the governmental purpose is fully achieved and the governmental interest and function in the transaction ceases. (Appellant's Brief, pp. 45, 47.)

To answer these contentions on the distinguishing features (a) The State of New York did not participate in the Big Tree Treaty. Under the Hartford Convention (exhaustively described by Mr. Chief Justice Stone in *Massachusetts* v. *New York*, 271 U. S. 64) its preemptive right of occupancy had been relinquished to the state of Massachusetts, whose representative consummated the treaty with the Hon. Jeremiah Wadsworth, commissioner appointed by the President of the United States to hold same in pursuance of the Constitution and act of Congress. It is idle to suppose that the Seneca Indians had any comprehension of the fine distinctions of sovereignty retained by the States of Massachusetts and New York respectively. What they really recognized, however, was the domination of the white man in their territory, and looked to the federal government to shield them in the negotiations which was to separate them from the whites, establish them on reservations exclusively their own, for their own protection. At the same time, they wanted the right to roam on the lands ceded for

the purpose of enjoying their ancient hunting and fishing privileges in common with the whites. The Senecas sought a treaty guarantee against unjust discrimination just as did the Yakimas in the Treaty in the instant case.

At the time of the Stevens Treaty, in 1855, Washington was then a Territory. Possibly the Indians did not fully comprehend the intricacies of existing and future government. They did know of the existence of white domination in the Territory, and realized the whites were migrating there in ever increasing numbers. Likewise, they looked to the Federal government to place them on reservations set apart for their exclusive use and enjoyment. As was said in the *Winans* opinion "The contingency of the future ownership of the lands was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it for the extent and for the purpose mentioned."

Another parallel in the case at bar and the *Kennedy* case, both as to historical background and contention urged in both cases, is suggested by the proceedings at the time the treaties were made. In the *Kennedy* case, the government filed an elaborate supplemental brief containing the minutes of the meeting with the Senecas, in support of its version of the Indians' understanding of the whole transaction. In the case at bar, the government filed the minutes of the proceedings in the Stevens Treaty, in support of its contention as to what the Indians understood that the transaction involved in the Yakima Treaty meant. A reading of either of these fascinating documents reveals that what the Indians clearly understood in each instance was that their respective territories, formerly occupied by them alone, were now being dominated by the whites in increasing numbers, that they were becoming subordinate to white law and that the government was separating them on reservations exclusively their own, and that their activities off the reservation were to be shared in common with the white man.

(b) The government's present contention that the transaction known as the Big Tree Treaty (7 Stat. 601) did not

rise to the dignity of a treaty is diametrically opposed to the contention by the government in the *Kennedy* case involving that very treaty itself. There, both the Plaintiff in Error and the government stressed the fact that the Big Tree Treaty was a full and complete treaty, a solemn obligation entered into in good faith by the United States as a contracting party, with all the force of an act of Congress, and was expressly ratified by the Senate and proclaimed by the President.

This is *a propos* to appellant's contention that the judgment of the Supreme Court of Washington should be reversed because it constitutes a violation of Art. VI, clause 2, of the Constitution, which makes a treaty "the supreme law of the land", and that the right to regulate Indian fishing is wholly within the scope of Federal authority.

There is nothing new and novel in this contention. It was strenuously urged by both the Plaintiff in Error and the government in the *Kennedy* case that the Big Tree Treaty as the "supreme law of the land" had never been abrogated, modified or repealed, and that thereby the United States had declared, and did still declare that the Seneca Indians had a free right of fishing and hunting on ceded lands, with such limitations only as the treaty itself reasonably implies, and that a state law which limits the right as to time, means and methods so as to make it practically valueless for purposes of continuous subsistence, are in direct conflict with the treaty.

The government urged that such laws, with their criminal sanctions, "interfere forcibly with the regulations established by the United States and the Indians, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the Union" (citing *Worcester* v. *Georgia*, 6 Pet. 515).

In the *Kennedy* case, the government further forcefully contended that state police powers must yield when clearly in conflict with the prohibitions of the Constitution or with Federal law or treaties passed or made in the exercise of the powers, and that the hunting and fishing rights in-

volved were part of the original Indian right of occupancy, reserved in the very instrument of cession, never relinquished, and continuously held under the ancient Indian title. The *loqus in quo* (within the state of New York, as the *locus in quo* in this instance, is in the state of Washington) the government argued, was therefore, and has always remained an Indian reservation *pro tanto*.

Thus, we respectfully submit that every major contention by the appellant in the case at bar, and others advanced with equal force, were urged upon this court, and were rejected by it. The *Kennedy* v. *Becker* case stands for the proposition that a reservation in a treaty of common fishing privileges with grantees and their heirs on ceded lands, impresses the land so ceded with a perpetual easement or servitude, and does not restrain the state in any reasonable regulation of the privileges by those entitled to enjoy them.

No other meaning can be gleaned from the language of Mr. Justice Hughes, which, *a fortiori* is all the more unmistakable in its application to the case at Bar since specific reference is made by Mr. Justice Hughes to the Yakima Treaty in announcing this rule

(4) *Coyle* v. *Smith*, 221 U. S. 559, was decided in 1911. This case stands unequivocally for the proposition that "the power given to Congress by Par. 3 of Article 4 of the Constitution to admit new States relates only to such States as are equal to each other "in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Skiriotes* v. *Florida*, 313 U. S. 69. In the *Coyle* case, this court reaffirmed the application of this rule to the inheritance of absolute power over wild life by a state on admission into the Union, even when asserted and maintained against the claim that the police power over its fish and game had been restricted by an Indian Treaty, citing *Ward* v. *Race Horse* with approval.

INDIAN CITIZENSHIP DOES NOT DIVEST THE STATE OF ITS POLICE POWER.

Appellant contends that the grant of citizenship to the Indians does not dissolve their tribal relationship *ipso facto* and hence that the investiture of the Indians with citizenship rights does not divest them of their treaty rights. But these rights are not absolute without regard to the change of conditions that have taken place since their conception. The argument is met in substance by Mr. Justice Black in the case of *Jackson County* v. *U. S.*, 308 U. S. 343, 354:

> "Congress has traditionally treated the Indian wards of the Nation with particular solicitude, but has also gradually evolved a policy looking to their eventual absorption into the general body of citizenry. This policy has progressively subjected Indians to the laws under which all other citizens must live in the Indians' State of residence, if not in conflict with specific protective measures of Congress."

When Indians became full fledged citizens in 1924, they became entitled to all the immunities and benefits of citizenship and also became subject to the laws of the state enacted for the protection of the citizenry, including traffic laws, health laws, pure food and drug laws, in fact, all laws enacted by the state within the contemplation of its police powers.

The general purpose of the government is to protect the Indian, not to injure him. The government, as in the *Winans* case, wanted to insure equal fishing privileges for the Indians. Fish regulations are not the kind of regulations which tend toward deprivation of his rights, but that kind of regulation which tend toward preservation of the fish, and the attendant preservation of the benefits incident to the fishing privilege which the treaty secured the Indian against discrimination. In proportion as fish laws protect and preserve the game, are they beneficial to the Indian as well as to others who enjoy the fishing privileges. The right to fish of the character granted in the treaty, like

any other property right or privilege, is subject to reasonable regulation necessary to its security.

FEDERAL TREATY POWER DOES NOT ABRIDGE THE STATE'S POLICE POWER.

Appellant contends that *United States* v. *Winans* is wholly controlling of the issues of the case at bar, and that *Ward* v. *Race Horse, Coyle* v. *Smith* and *Kennedy* v. *Becker* have been superseded by *Missouri* v. *Holland,* 252 U. S. 416; *Askara* v. *Seattle,* 265 U. S. 332; *Nielsen* v. *Johnson;* 279 U. S. 47, and *U. S.* v. *Belmont,* 301 U. S. 324, which appellant contends squarely hold that state statutes enacted pursuant to the police power must yield to exercises of the federal treaty power. (P. 18 Appellant's brief)

An analysis of these opinions reveal that *Askara* v. *Seattle* and *Nielsen* v. *Johnson* merely hold that a city ordinance and a state statute, respectively, may not discriminate against aliens in violation of an express treaty provision to the contrary. These cases are in no manner in point.

The same is true of *U. S.* v. *Belmont,* which in no respect involved the police power of the states. The only question involved was whether or not the state court could refuse to give effect to a confiscatory act of the Soviet Government, the right under which had passed to the United States under the treaty in question.

The strongest case in support of the government's contention is *Missouri* v. *Holland, supra. Ward* v. *Race Horse, Coyle* v. *Smith* and *Kennedy* v. *Becker* are not so much as mentioned. Had it been the intention of this court to overrule or diminish the effect of those decisions, at least some reference would have been made to these earlier cases.

More significant, the basis of the decision in *Missouri* v. *Holland* is clearly indicated in the concluding paragraph of the opinion by Mr. Justice Holmes, which reads:

> "Here a *national* interest of very nearly the first magnitude is involved. It can be protected *only* by national

action in concert with that of another power. The subject matter is only transitorily within the state and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and of our crops are destroyed. It is not sufficient to rely upon the states. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of the opinion that the treaty and statute must be upheld. Carey v. South Dakota, 250 U. S. 110." (Italics supplied)

In the case at bar, we are confronted with exactly the opposite situation. That a local, rather than a national interest is involved is admitted by appellant (Appellant's Brief, p. 25) and the reasons which called for the supremacy of the federal statutes in the *Missouri* v. *Holland case,* call for supremacy of the state regulatory statutes in the instant case. In the *Missouri* case, the court declared that to hold the state statutes valid would be to prevent effective bird conservation. In the case at bar, effective fish conservation for the Indian citizen and the white citizen depends upon the power of the state to reasonably regulate.

The subject matter in the instant case is not transitorily within the state, but on the contrary, has a permanent habitat therein, in that the fish migrate to and from the ocean, return to the haunts of their nativity in the headwaters and tributaries of the state to spawn and reproduce under the protecting hand of the state. The state alone has jurisdiction to regulate their taking, with a view to scientific security of future supply. The federal government is powerless to invade the state's domain, and preempt the field of regulation in state waters, which is a valid exercise of police power residing exclusively in the state and which cannot be surrendered to the federal government.

The state of Washington has announced its conservation policy toward its wild life.

Remington's Revised Statutes of Washington, Sec. 10866 declares: "The food fish in the waters of the State of Washington shall be preserved, protected and perpetuated and to that end such food fish shall not be taken at such times or places, by such means or in such manner as will impair the supply thereof." (Laws of 1921)

Remington's Revised Statutes of Washington, Sec. 5863 declares:

"The game animals, furbearing animals, game birds and non-game birds in the State of Washington, and the game fish in the waters of the State of Washington shall be preserved, protected and perpetuated and to that end such game animals, furbearing animals, game birds, non-game birds and game fish shall not be hunted, trapped or fished for at such times and places and by such means or in such manner as will impair the supply thereof." (Laws of 1925, Ex. Session)

Nothing in the treaty purports to cut down the state's right to protect through reasonable and appropriate regulation the fast diminishing fisheries. It is not incumbent upon a state to sit idly by and permit a particular group of its citizens to fish in defiance of state law, while another must conform thereto, when the very object of the conservation measure is to protect and insure the future supply for the enjoyment of each.

CONCLUSION.

We respectfully contend that the foregoing considerations conclusively demonstrate that as a matter of law the Stevens Treaty of 1855 vouchsafed to the confederated Yakima Tribe perpetual easement rights of ingress to and egress from their usual and accustomed fishing grounds, there *to fish in common with the citizens of the territory*; that the Enabling Act admitted Washington into the Union invested with all the powers inherent to a sovereign state, including the right to regulate its internal affairs for the welfare of its citizens; that, accordingly, the fishing rights

granted by the treaty is subject to the paramount and superior right of the state under the exercise of its sovereign police power to regulate the taking of fish from the waters within its jurisdiction; that Congress in 1924 granted the Indian full citizenship, and the Indian citizen can now fish in common and on a parity with citizens of this commonwealth; and that therefore the judgment of the Supreme Court of the State of Washington should be affirmed.

Respectfully submitted,

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